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No. 85-1349

In The
Supreme Court of the United States
October Term, 1985

INTAKE WATER COMPANY,
Petitioner,

v.

YELLOWSTONE RIVER COMPACT COMMISSION, et al.,
Respondents.

NONFEDERAL RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Donald D. MacIntyre*
Tim D. Hall
Special Assistants Attorney General
Montana Department of Natural Resources and Conservation
1520 East Sixth Avenue
Helena, Montana 59620
(406) 444-6699
Counsel for Montana Respondents

A.G. McClintock, Attorney General*
Jennifer Hager
Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7818
Counsel for Wyoming Respondents

Nicholas J. Spaeth, Attorney General*
Rosellen M. Sand
Charles M. Carvell
Assistants Attorney General
900 East Boulevard
State Office Building
Bismarck, North Dakota 58505
(701) 224-2210
Counsel for North Dakota Respondents

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTION PRESENTED

Whether Congress in passing an Act of Consent to an interstate compact that contains a provision that might otherwise impermissibly burden commerce has immunized the provision from Commerce Clause objection?

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NONFEDERAL RESPONDENTS' BRIEF IN OPPOSITION

The Nonfederal Respondents, the individual members of the Yellowstone River Compact Commission, the Montana Attorney General, the State Engineer of North Dakota, and the North Dakota Water Commission, respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Ninth Circuit Court of Appeals' opinion in this case. The opinion is reported at 769 F.2d 568.

REASONS WHY THE WRIT SHOULD BE DENIED

I. Review Should Be Denied Because The Ninth Circuit's Holding That The Yellowstone River Compact Is A Federal Law Immune From Commerce Clause Attack Is Correct.

The three-judge District Court in *Intake Water Co. v. The Yellowstone River Compact Commission*, 590 F. Supp. 293 (D.Mont. 1983) and the Ninth Circuit Court in *Intake Water Co. v. Yellowstone River Compact Commission*, 769 F.2d 568 (9th Cir. 1985) correctly found and applied the rule of law set forth by this Court in *Cuyler v. Adams*, 449 U.S. 443 (1981). In adopting the reasoning of the three-judge panel the Ninth Circuit held that when Congress approved the Yellowstone River Compact, Act of Consent to the Yellowstone River Compact, Pub.L. No. 231, ch. 629, 65 Stat. 663 (1951)[1], Congress was acting within its authority to immunize state law from some constitutional objections[2] by converting it to federal law. *Intake Water Co.* at 570. One such constitutional objection that may not be raised is the Commerce Clause objection. *Id.*

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1 The signatory states, Montana, Wyoming, and North Dakota, approved the Compact prior to congressional ratification. The Compact is codified in state statutes: MONT. CODE ANN. § 85-20-101 (1985); WYO. STAT. § 41-12-601 (1977); N.D. CENT. CODE § 61-23-01 (1960).

2 Compacts remain part of the law of the compacting states and the states act "under color of state law" when fundamental constitutional rights are involved and alleged to be violated. This is so since Congress does not have the power to abridge or to authorize the states to abridge fourth, fifth and fourteenth amendment rights.

The Ninth Circuit Court's cogent reasoning is as follows:

1.a. The Yellowstone River Compact was approved by an express act of Congress, signed into law by the President of the United States.[3]

b. When Congress approved the Yellowstone River Compact it transformed it into a law of the United States.

c. Federal legislation is not subject to the restrictions that the Commerce Clause imposes on state laws affecting commerce.[4]

2. The requirement necessary for Commerce Clause immunization is that Congress expressly state its authorization to immunize state law from Commerce Clause objection.

3. Article X of the Compact was before Congress and Congress expressly approved it.

4. A court may not rewrite a congressionally approved compact.[5]

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[3] The Yellowstone River Compact was passed by the House of Representatives and the Senate and was signed by President Truman. 97 CONG. REC. 13733 (Oct. 20, 1951).

[4] *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 423 (1946).

[5] As noted by District Judge Tashima, sitting by designation, in his concurring opinion:

> Congress has "expressly reserved" in the Act of Consent the "right to alter, amend or repeal" its consent

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The Commerce Clause objection raised by Petitioner (hereinafter Intake) springs from Article X of the Yellowstone River Compact, which reads in part:

> No water may be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory states [Montana, Wyoming, North Dakota] . . . .

Intake argues that Article X burdens commerce outside the Yellowstone River Basin.[6] The reasoning of the court of appeal's judgment renders Intake's argument untenable. Article X of the Yellowstone River Compact is immune from Commerce Clause attack. Consequently, Intake's challenge to the validity of Article X on the basis that it discriminates against, unreasonably impedes and exerts an undue burden on the flow of interstate commerce in violation of the Commerce Clause fails under any fact situation.

As a result of *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), it is settled that the dormant Commerce Clause would prohibit a state from unilaterally es-

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> to Compact. Pub. L. No. 231 § 2, 65 Stat. 663, 671 (1951). From this we may infer two things. First, that Congress reserved all that it intended to reserve when it approved the Compact. And, second, that Congress may, at any time, change its mind and withdraw Commerce Clause immunity.

Intake Water Co. v. Yellowstone River Compact Commission, 769 F.2d 568, 571 n. 3 (1985) (Tashima, D.J., concurring).

[6] The Yellowstone River Basin is the area of Montana, North Dakota and Wyoming that is drained by the Yellowstone River and its tributaries and includes the area in Montana known as Lake Basin but excludes those lands lying within Yellowstone National Park. Yellowstone River Compact, 65 Stat. 664, Art. II (1951).

tablishing a water allocation system within the state by excluding water users from outside the state unless the restriction serves the state's legitimate water interests. However, with a narrow tailoring Montana, North Dakota and Wyoming may join together to establish a regional allocation system, i.e., in the Yellowstone River Basin, that prohibits or restricts allocations among users outside the Basin without offending against the rule enunciated in *Sporhase*. But to do so without congressional approval may create Commerce Clause objections. *See Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980).

This case involves a congressionally approved interstate agreement. Historically, both Congress and the United States Supreme Court have encouraged interstate cooperation and the resolution of interstate conflicts, such as with water allocation, through the use of this special instrument called an interstate compact. The Yellowstone River Compact is an example of a compact resulting from years of serious negotiations and cooperation between the compacting states and the federal government over the waters of the Yellowstone River Basin.[7] In 1949 Congress

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[7] The Yellowstone River Compact is the result of many years of negotiations to reach agreement on the allocation and use of the waters of the Yellowstone River. The consent of Congress to first compact was granted by Act of June 14, 1932, ch. 253, 47 Stat. 306 (1932). Subsequently, an agreement was entered on February 6, 1935, between the Wyoming and Montana Commissioners, but neither state legislature acted upon the agreement. By Act of August 2, 1937, ch. 552, 50 Stat. 551 (1937), Congress again granted its approval to negotiate a compact between Montana and Wyoming. Because of a lack of data no compact was resolved

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gave its consent to Montana, North Dakota, and Wyoming to negotiate a compact by not later than June 1, 1952. Pub. L. No. 83, 63 Stat. 152 (1949). The compact was to provide for an equitable division and apportionment of the water supply of the Yellowstone River between the three compacting states. Congress provided that a representative of the United States participate in the negotiations and to report to the Congress on the negotiations and any compact entered into by the compacting states. *Id.* at 153. The necessity for a federal representative and a subsequent status report to Congress followed from Congress' instruction to the states that any compact entered into would not be binding upon any party unless approved by each state legislature and by Congress. *Id.* at 152. Having successfully negotiated and approved the Yellowstone River Compact the states placed the Compact before Congress for its express action pursuant to the congressional directive in Public Law No. 83. Congress affirmatively responded with the Act of Consent to the Yellowstone River Compact, Pub.L. No. 231, ch. 629, 65 Stat. 663 (1951).

Clearly, the commerce power of Congress is not dormant in this case. It was exercised by Congress in 1951 when it enacted the Act of Consent to the Yellowstone

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but a recommendation was made by the Commissioners that North Dakota be involved in future negotiations. Congressional consent to an extension of time within which to negotiate a compact between the three basin states was given in 1940. Act of June 15, 1940, ch. 372, 54 Stat. 399 (1940). A resultant compact was signed in 1942 but the Wyoming Legislature failed to ratify it. This was followed by a third compact, ratified by the legislatures of all three states, but vetoed by the Governor of Wyoming. The final series of negotiations that ultimately led to the Yellowstone River Compact commenced in 1949.

River Compact. Congress had Article X before it and expressly approved it by its act of consent. And when Congress so chooses, state actions which Congress plainly authorizes are invulnerable to commerce clause objections. *Northeast Bancorp Inc. v. Board of Governors of the Federal Reserve System,* — U.S. —, 105 S.Ct. 2545, 86 L.Ed.2d 122 (1985).

As to whether Congress was acting within its authority to immunize state law from some constitutional objection by converting it into federal law when it acted in giving consent to the Yellowstone River Compact, this Court need only look to its holdings in *Cuyler v. Adams, supra,* and *Texas v. New Mexico,* 462 U.S. 554 (1983).

In *Cuyler* it was held that an Interstate Agreement on Detainers was a substantive federal law because congressional consent transformed the interstate compact into a law of the United States:

> Because congressional consent transforms an interstate compact within this clause into a law of the United States, we have held that the construction of an interstate agreement sanctioned by Congress under the Compact Clause presents a federal question.
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> 449 U.S. at 438.

Cuyler was cited as authoritative in *NYSA-ILA Vacation & Holiday Fund v. Waterfront Commission New York Harbor,* 732 F.2d 191 (2d Cir.), *cert. denied,* — U.S. —, 105 S.Ct. 175, 83 L.Ed.2d 109 (1984). There, New Jersey and New York entered a compact with the consent of Con-

gress[8] dealing with the improvement of labor conditions in the port of New York area. The issue raised was whether the compact was preempted by the Employee Retirement Income Security Act (ERISA). The Second Circuit Court relying on *Cuyler* held that the consent of Congress transformed the compact into federal law and therefore it was not preempted by ERISA.[9] The rule of *Cuyler* is clear: congressional consent of an interstate compact transforms it into a law of the United States—a federal law.

The United States Supreme Court holding in *Texas v. New Mexico* is similarly instructive. There, this Court talked about the metamorphosis involved in congressional consent of interstate compacts:

> Under the Compact Clause, two States may not conclude an agreement such as the Pecos River Compact without the consent of the United States Congress. However, once given, "congressional consent transforms an interstate compact within this Clause into a law of the United States." *Cuyler v. Adams*, 449 U.S. 433, 438 (1981); see *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518, 566 (1852). One consequence of this metamorphosis is that, unless the compact to which Congress has consented is somehow

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[8] Act of Aug. 12, 1953, Pub. L. No. 83-252, 67 Stat. 541 (1953). The purpose of the Act was " . . . to grant congressional consent, pursuant to the Federal Constitution, to an interstate compact between the States of New York and New Jersey setting up a bi-state agency to improve waterfront labor conditions in the port of New York area." A similar express enactment of Congress was evidenced by the Act of Consent to the Yellowstone River Compact, 65 Stat. 663, ch. 629, Pub. L. 231 (1951).

[9] Section 514(d), 29 U.S.C. § 1144(a), of ERISA provides that the provisions of ERISA do not preempt any federal statutes.

> unconstitutional, no court may order relief inconsistent with its express terms.
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> 462 U.S. at 564.

The metamorphosis allows the federal courts to scrutinize the Compact for unconstitutional abridgement of fundamental constitutional rights, such as those protected by the fourth, fifth, and fourteenth amendments. This is to say that a congressionally approved compact is subject to the same constitutional analysis as is any federal statute, and by definition a federal statute is not subject to scrutiny under the Commerce Clause. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 423 (1946).

Finally, the Yellowstone River Compact is an enactment of Congress. All segments of the country were represented and a collective decision was made through the action of Congress. No clearer expression of approval by Congress can be made than by enactment of the statute itself and in the case at issue by the enactment of the Yellowstone River Compact. The signatory states and Congress have enacted precisely the same statute. This case is unlike the *Sporhase* type cases wherein there is a unilateral imposition of an unreasonable burden on interstate commerce. Here there is no unilateral action; Congress and the States have acted in concert in effectuating the Compact. The Yellowstone River Compact is an outstanding example of interstate cooperation. The Compact's provisions were carefully drafted through arduous negotiations and thereafter expressly approved by Congress and the compacting states. Since the Yellowstone River Compact has been expressly consented to by Congress it is a federal law for purposes of Commerce Clause objections and is immune from attack.

II. Review Should Be Denied Because The Decision Of The Ninth Circuit Does Not Create An Intolerable Conflict Among The Nation's Federal Appellate Courts.

This is simply not a case warranting the exercise of this Court's certiorari jurisdiction because the Ninth Circuit's decision does not create an intolerable conflict among the nation's federal appellate courts.

Intake cites to no intolerable conflict. Rather, Intake argues that review is necessary to protect federal commerce interests and to reconcile a perceived conflict between Commerce Clause and Compact Clause precedents. But the facts are that no intolerable conflict exists among the nation's appellate courts on the question presented.

Nonfederal Respondents acknowledge that water is an article of commerce subject to congressional regulation. *Sporhase v. Nebraska ex rel. Douglas, supra.* The Nonfederal Respondents do not rely herein on the assumption that the signatory states have an ownership right to exclude others from Yellowstone River water. It is recognized that without the consent of Congress a state, either on its own or in combination with other states, may not impose burdens on interstate commerce in water unless the restrictions are tailored to serve the state's legitimate water interests. *Id.* Consequently, Intake's reliance on case law[10] supporting the proposition that the Commerce

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[10] Petition for a Writ of Certiorari, note 7 at pages 8-9 cites to: *Hughes v. Oklahoma,* 441 U.S. at 326-355 (state regulation of wildlife must conform to the Commerce Clause); *Philadelphia v. New Jersey,* 437 U.S. 617, 625-628 (1978)

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Clause restricts exclusive state ownership of resources identifies no conflict between the parties to this case nor among the nation's lower courts on the issue before the Court. Unlike any case cited by Intake, Congress has explicitly approved the "barrier to interstate commerce"[11] in approving the Yellowstone River Compact.

Regardless of the language Intake chooses to couch its assertions of conflict, the issue for which review is requested is whether when Congress approves a compact it converts the provisions of the compact into federal law

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(interstate access to solid waste disposal capacity in New Jersey may not be prohibited in order to preserve the State's environmental resources); *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983) (states may not preserve solely for its own inhabitants natural resources located within its borders); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 951, 956 (1982) (water is an article of commerce, and Nebraska may not ban its export based upon a lack of reciprocity); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911) (Oklahoma may not prohibit the interstate transfer of natural gas). None of the cited cases address the issue before the Court as to whether when Congress passes an Act of Consent to a compact it gives the consent necessary to immunize the subject legislation from Commerce Clause attack.

[11] Petitioner argues the language of Article X of the Yellowstone River Compact that "[n]o waters shall be diverted from the Yellowstone River Basin without unanimous consent of all the signatory states" is an absolute ban. Article X does not provide that water may not be diverted out of the Basin. It simply provides for the consent of the States of Montana, North Dakota and Wyoming prior to the out-of-basin transfer. A facial examination of Article X and the implementing state statutes, which are not challenged herein, reveals that the state laws provide for and allow the exportation of water from the Basin. MONT. CODE ANN. §§ 85-2-801 to 807 (1985); N.D. CENT. CODE § 61-02-14 (1960); WYO. STAT. §§ 41-12-603 to 607.

sufficient to immunize the compact from Commerce Clause objection. Intake acknowledges that the Compact has received congressional approval but argues that absent specific indications to the contrary, congressional consent does not operate as a blanket approval for state actions under a compact which would otherwise violate Commerce Clause restrictions. The uniqueness of Intake's argument is summed up in the concurring opinion of the Ninth Circuit Court:

> While arguing strenuously that its position is supported by case law, Intake acknowledges that it advances a novel proposition (i.e., that, in terms of the issue it tenders, this is a case of a first impression). None of the many cases cited by Intake squarely support its contention.
>
> 769 F.2d at 570-71 (Tashima. D.J., concurring).

The novelty of Intake's position is reaffirmed in its Petition, wherein it is stated:

> The instant case thus presents the *first opportunity* for this Court to provide guidance on the *unexplored*—and increasingly significant—linkage between the congressional commerce power and the constitutional requirement that Congress approve certain interstate agreements.
>
> *Pet.*, p. 13. (emphasis added).

The issue raised by Intake has not been presented in prior cases in this Court. Nor has the precise issue been presented to any other Circuit Court of Appeals. Consequently, there is no conflict, much less an intolerable conflict, among the nation's federal appellate courts. The question raised does not deserve this Court's discretionary review.

CONCLUSION

The issue raised by Intake is not reflective of any intolerable conflict among the nation's federal appellate courts. It is a novel issue which does not deserve discretionary review. Regardless of the uniqueness of the issue, the Ninth Circuit Court decision is correct as a matter of law. The Yellowstone River Compact as expressly approved by Congress is immune from Commerce Clause attack.

The petition for certiorari should be denied.

Respectfully submitted,

DONALD D. MACINTYRE*
TIM D. HALL
Special Assistants Attorney General
Montana Department of Natural
Resources and Conservation
1520 East Sixth Avenue
Helena, Montana 59620
(406) 444-6699

Counsel for Montana Respondents

A.G. McCLINTOCK, Attorney General*
JENNIFER HAGER
Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7818

Counsel for Wyoming Respondents

NICHOLAS J. SPAETH, Attorney
General*
ROSELLEN M. SAND
CHARLES M. CARVELL
Assistant Attorneys General
900 East Boulevard
State Office Building
Bismarck, North Dakota 58505
(701) 224-2210

*Counsel for North Dakota
Respondents*

*Counsel of Record